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CURRENT TOPICS.

How far legal reformation reforms, is an important question in the solution of which the legal profession, the legislature and the public at large are alike interested, though for different reasons. The absolute necessity for a cheap, prompt and impartial administration of justice has been recognized during the last half century, wherever Anglo-Saxon civilization has been ascendant by the most radical changes in our various elaborate systems. The results have not always been encouraging. And it is a grave question to-day, whether the gain in simplicity and promptness has not been counterbalanced by a loss of certainty and definiteness of principle. Litigation may be cheaper now than it was forty years ago, but we think it may safely be said that it could become much cheaper yet, without creating any risk that the citizen would be encouraged to plunge, pell-mell, into causeless and unwarranted controversy with his fellows. That this disappointment in the results of the various reforms in procedure is not peculiar to this couutry, is illustrated by the following remarks contained in a recent issue of the *Law Times*, one of the most thoughtful and ably-conducted law journals in the world: "A striking commentary on our boasted legal reform is the case of Meyrick v. James, heard by Mr. Justice Kay on Saturday last. The facts are very simple. The suit was instituted many years ago for the administration of an estate, and a decree was made directing certain inquiries. The sum of money in court is £700, and the parties, finding that after payment of costs nothing would remain for distribution, desired to bring the case to a conclusion. The judge said he considered the case a shocking one, seeing that there had only been one debt of about £80 to satisfy, and directed that the costs should be carefully taxed before payment out of the fund in court. The case is that of Jarndyce v. Jarndyce over again, except that the fund in dispute is smaller. That has been considered a highly colored version of one of the most notorious of the Chancery suits tried before Lord Eldon in the latter part of his chancellorship; but people who read the present case, bearing in mind what reforms are supposed to have been effected in Chancery procedure since that time, will incline to view it as a faithful picture of what frequently occurred in those days. Of Lord Eldon's cases the complaints referred as much to the dilatory conduct of the judge as to the procedure. In the one under comment the fault lies entirely with the procedure, and the explanation required to be given to Mr. Justice Kay will have to be an exceptional one before the public will be satisfied that a procedure capable of such things is not in most urgent need of reform."

We are inclined to believe that if an unprejudiced observer will take up at random a volume of modern reports, especially in our Western States, he will be surprised to note the number of instances in which the controversies decided are clearly frivolous in their character, and without substantial merit in law and equity. And this surprise will be in no wise decreased when he observes the care and courtesy with which the judiciary are accustomed to examine the claims of these men of straw. Much valuable time, that should be devoted to clearing overcrowded dockets, is thus lost, and our volumes of reports are incumbered by an almost useless lumber. Though, as a matter of course, the responsibility for this state of affairs does not rest solely upon the shoulders of the judiciary, and though a portion of it must be charged to a lack of thoroughness and precision on the part of the counsel who bring up such cases, and in some instances, we fear, even to their want of professional honesty, still, we believe that much might be done by the judges to reform the evil and avoid its consequences, if such cases were dealt with more summarily. It ought to be remembered that, though patience is a cardinal virtue upon the bench, there are limits in the waste of the court's time, which the counsel should not be permitted to pass, though to do so might not amount to technical contempt. It is becoming a judge, unquestionably, to hear carefully both sides of a question; but it behooves him also

to be sure there is a question. Unless counsel speak to the point, and a point of real merit, he should be stopped and his discussion turned into a more profitable channel; and if this fails to develop the merits of the controversy, he should be made to sit down. We have in mind one or two Federal judges in whose courts business is conducted upon this plan, and the dispatch of business in their jurisdictions is something worthy the imitation of judges everywhere.

ADULTERY IN ACTIONS FOR DIVORCE.

Adultery is defined in Jacob's Law Dictionary as, "*Adulterium, quasi ad alterius thorum* * * * * the sin of incontinence between two married persons, or, if one of the persons be married, it is nevertheless adultery."

As to the degree of evidence needed to prove the act, the rule differs in indictments and actions for divorce.[1] The case of Lovedon v. Lovedon[2] seems to be an oft-quoted authority to the effect that adultery may be proved by such circumstances as lead fairly, reasonably and necessarily to such conclusion. A clear and most thorough exposition of the principles of the law, applicable to cases of this character, is therein made by Sir William Scott; this, together with the note thereto of the cause of Cadogan v. Cadogan, affords an excellent digest *de* the kind and degree of proof required.

We think that, although no absolute rule can be laid down as to the kind of circumstantial evidence that shall be sufficient to warrant a legal conclusion of guilt,[3] yet any evidence is relevant, which, in itself, directly leads to the conclusion of adultery; or which, combined with other circumstances, tends to prove adultery; or which, although in itself irrelevant, is explanatory of, or characterizes relevant evidence.[4] So the conduct of the parties contemporaneous with the alleged acts,[5] the proximate causes and results, and the acts of the parties conducing to such causes, when such acts are not too remote,[6] are relevant. Consequently, evidence that, after the filing of the petition, the alleged paramour had continued his terms of intimacy with the wife, and frequent opportunities had occurred for commission of the adultery, was held competent, and, when combined with corroborative evidence of previous acts, from which adulterous intercourse might fairly be presumed, was deemed sufficient.[7] In Ferrier v. Ferrier,[8] the court refused a decree for acts of adultery committed after filing the bill;[9] and circumstances, showing that the illicit intercourse commenced before marriage still continued, considered a fair presumption of adultery which could only be rebutted by the best evidence.[10] Though where it was offered to prove incontinence before marriage, held, not admissible.[11] On an indictment for adultery, held, that admissions made by one defendant to another, in the presence and hearing of witness, although this was all he did hear of the conversation, were relevant.[12] In Commonwealth v. Durfee,[13] the court admitted evidence of previous familiarity, for the purpose of showing the probability of the existence of acts charged, and of corroborating them.[14] This case is recognized as law in Commonwealth v. Horton,[15] though the principle recognized in Commonwealth v. Lahey, 14 Gray, 91, and Commonwealth v. Pierce, 11 Gray, 447. But *contra*, see Commonwealth v. Horton, 2 Gray, 354.

1 2 Greenl. on Ev. (13th ed.), sec. 40, and note.

2 2 Hag. Con., 2.

3 2 Bishop on Marriage and Divorce, sec. 616.

4 Boody v. Boody, 30 L. J. Pr. & Mat. 23; Commonwealth v. Curtis, 97 Mass. 574; Thayer v. Thayer, 101 Mass. 111, where evidence of adulterous intercourse between the *part.crim.*, had outside the State after the acts charged in the libel, was admitted, quoting Com-

5 State v. Marion, 35 N. H 22; State v. Wallace, 9 N. H. 515. We believe that the general rule of law in regard to the admission of facts contemporaneous with the principal relevant facts would govern, Kearney v. Farrel, 28 Conn. 317; Johnson v. Sherwin, 3 Gray, 374; 1 Greenl. on Ev. (13th ed.), sec. 108, and notes.

6 Mulock v. Mulock, 1 Edw. Ch. 14; Arkley v. Arkley, 3 Phill. (1 Eng. Ec. 461), 500.

7 Hammerton v. Hammerton, 3 Hag. (5 Eng. Ec. 11) 1; s. c., 2 Hag. (4 Eng. Ec. 12, 224), 8, 618.

8 4 Edw. (N. Y.) 496.

9 *Post*, Sewall v. Sewall and Hammerton v. Hammerton.

10 Van Epps v. Van Epps, 2 Barb. 320; Smith v. Smith, 4 Paige, 432.

11 Larrison v. Larrison, 20 N. J. Eq. (5 C. E. Green) 100. But see 2 Bish. on Mar. & Div., secs. 635-636.

12 Commonwealth v. Pittsinger, 110 Mass. 101.

13 100 Mass. 146; Commonwealth v. Marrian, 14 Pick. 518.

14 See State v. Wallace, 9 N. H. 515.

15 2 Gray, 354.

wealth v. Turner,[16] decided about eight years later, and in Commonwealth v. Wilson,[17] decided about sixteen years after, are apparently to the contrary.[18] These causes were indictments, where the evidence was of one act of adultery only, set forth as such in a single count. They have been cited here to show that, in indictments under the laws of Massachusetts, the general tenor of the decisions is a tendency in favor of the admission in evidence of any and every circumstance, however remotely relevant, from which can be rationally deduced a probability that the act of adultery has, or has not, been committed, and such is undoubtedly the rule in civil causes.[19] Sewall v. Sewall,[20] was a bill for divorce for adultery after condonation. The court held proof of prior and subsequent acts sufficient; quoting Newsome v. Newsome,[21] Rowley v. Rowley,[22] and Robbins v. Robbins.[23] Admissions of the alleged paramour, implicating the wife, and made a year previous, were ruled inadmissible; the acts alleged being of a time certain.[24] In this connection, it seems proper to call attention to the following cause, in which a question arose whether a statement made by one M to the wife, as being an admission of the party with whom she was charged to have had illicit intercourse, amounted to a confession by her, and the court admitted testimony as to her manner of receiving the same.[25] Where the acts charged were committed after the commencement of a former suit, in which the same acts were alleged, it was determined that the action could be maintained.[26] But on a petition for a divorce, evidence of acts of adultery was rejected, where the same had been adduced in support of a previous libel between the parties, which libel had failed.[27]

In addition to the necessity of the act being unlawful, the mind must acquiesce, or actively consent in its consummation, to constitute adultery.[28] The concurrence of an adulterous disposition between the parties charged, together with an opportunity for the commission of the act, is required.[29] So, in a recent case, Colt, J., says: "But when an adulterous disposition is shown to exist at the time of the alleged act, then mere opportuity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place."[30] We therefore cite in this connection some facts that have been brought before the consideration of the courts. Where the only proof was of conduct highly imprudent and culpable, held, insufficient.[31] Where the wife's conduct was of such great freedom of manners as could not have existed among refined people, though it had not affected her social standing in the community where she lived, and the other testimony was of improbable character, decided not to warrant an inference from which the presumption of adultery would legally follow.[32] Constant association, frequent meetings and great intimacy, but not amounting to undue familiarity, are insufficient.[33] In this last cause, the judge cited Pollock v. Pollock,[34] where the proof lacked the element of criminal intent, and although the conduct of the claimed *part. crim.* may have been of questionable character, yet it was consistent with in-

16 3 Metc. 23-24.
17 2 Cush. 591.
18 State v. Bates, 10 Conn. 372.
19 1 Greenl. on Ev., sec. 47, note; 25 Am. Dec. 422.
20 122 Mass. 156.
21 L. R. 2 P. & D. 306; s. c., 1 E. C. L. R. 242, and note.
22 L. R. 1 H. L.; s. c., 63, 65, 68.
23 100 Mass. 150; 3 Abbott N. C. (N. Y.) 161, Sup. Ct. 1877; State v. Marion, 35 N. H. 22; Hammerton v. Hammerton, 2 Hag. Ec. (5 Eng. Ec. 11) 1; Commonwealth v. Curtis, 97 Mass. 574; Gardiner v. Madeira, 2 Yeates, 466; Burr v. Burr, 10 Paige, 20, affirmed, Ct. of Err., 7 Hill, 207; Whispell v. Whispell, 4 Barb. 217; Beers v. Jackman, 103 Mass. 194.
24 Dunn v. Dunn, 11 Mich. (7 Cooley,) 284; Miller v. Miller, 20 N. J. Eq. (5 C. E. Green) 216; being testimony of *part. crim.* to admissions made a long time before.
25 Harris v. Harris, 2 Hag. (4 Eng. Ec. 169-170) 376.
26 Cordier v. Cordier, 26 How. 187.
27 Lewis v. Lewis, 106 Mass. 309.
28 Bouvier's Law Dictionary.
29 Abbott's Tr. Ev., 744, sec. 5; 2 Bishop on Mar. & Div., sec. 619; Inskeep v. Inskeep, 5 Clarke, 204; Harris v. Harris, 2 Hag. 376, cited above; Bramwell v. Bramwell, 3 Hag. (5 Eng. Ec. 232) 618; Soilleux v. Soilleux, 1 Hag. Con. 373; Ciocci v. Ciocci, 26 Eng. L. & E. 604; Platt v. Platt, 5 Daly, 295; Van Epps v. Van Epps, cited above.
30 Thayer v. Thayer, 101 Mass. 111.
31 Hammerton v. Hammerton, 2 Hag. (4 Eng. Ec. 13) 8. For additional cases, see Abbott's Tr. Ev. 744, note 9.
32 Bishop v. Bishop, 17 Mich. 211; Dunn v. Dunn, 11 Id. (7 Cooley) 284; Soper v. Soper, 29 Id. (7 Post) 306.
33 Conger v. Conger, 82 N. Y. (37 Sickels) 604.
34 71 N. Y. 137.

nocence. It was furthermore stated in this cause, that the *status* and social position in life of the parties, as affecting the probability of the crime being committed, their calling, the character of their places of cohabitation and general resort, their manner of meeting, whether open or clandestine; their general bearing towards each other, were all competent.

Circumstances which seemed to establish guilt were rebutted by proof of ill-health, of so serious a nature as was consistent with no other hypothesis than that of innocence.[35]

The circumstances should not be merely suppositive, not matters of conjecture alone, but must be one of the adjuncts of actual, relevant facts. Hence, if the entire testimony be of scandal, charging adulterous acts; declared to be not only not satisfactory proof, but hearsay evidence of such a character as should have no weight.[36] Thus, ill-fame of defendant and her house are insufficient.[37] And so of venereal disease appearing a short time after marriage.[38] Though *contra*, when same was contracted a long time after marriage.[39] The testimony of common prostitutes, when unsupported by other evidence, held, not satisfactory. There were two cases where *ex parte* depositions, signed simply by marks, were offered as proof.[40] The fact is not admissible in evidence, that the woman with whom the crime was alleged to have been committed gave birth to a child, begotten at, or about, the time of the adulterous acts as declared upon.[41] A curious cause is that of Kneale v. Kneale,[42] where children of the parties were called to corroborate the previous testimony. But the evidence thus adduced, was of acts done when the children must have been of such tender age that they could not have conceived a competent idea of the character of those acts; held, insufficient, and that the practice of calling such witnesses was of "evil tendency" and "reprehensible."

[35] 3 Abbott's N. C. (N. Y. Super. Ct. 1877) 161.
[36] Soper v. Soper, 29 Mich. (7 Post) 306.
[37] Miller v. Miller, 20 N. J. E. (5 C. E. Green) 216.
[38] Mount v. Mount, 15 N. J. E. (2 McCarter) 162.
[39] Bishop on Mar. & Div. (4th ed.) sec. 632, and notes thereto.
[40] Banta v. Banta, 3 Edward, 295, note *a*; Turney v. Turney, 4 Id. 566.
[41] Commonwealth v. O'Connor, 107 Mass. 219.
[42] 28 Mich. (6 Post) 344.

In considering the question of what, in this action, is competent evidence, it may not be amiss to mention the cause of Commonwealth v. Gray.[43] Here the averment being of sexual intercourse, had with one Elizabeth Kirnan by the defendant, he attempted to introduce testimony of her good character. This was ruled out in the lower court. In the court above, Lord, J., says: "Nor is the materiality of facts, not bearing directly upon the issue, confined to circumstances introduced upon issues, to be sustained wholly by circumstantial evidence. It rarely happens, and in a contested case perhaps never happens, that some fact, in its character unimportant, and having no bearing upon the issue upon trial, does not become material, so that evidence in relation to it can not be rejected. * * * * It is quite true, that legally her (Kirnan's) character or reputation is not in issue. No judgment upon this indictment can affect either her or her reputation; and in no proceeding against her would a judgment upon this indictment be admissible in evidence; still, her character or reputation may be a material fact, and so evidence upon it be competent and material."

Consequent upon the fundamental principle, that all material facts must be proved in this action,[44] the question arises, whether that proof must be beyond a reasonable doubt, as is required in criminal causes, or whether a mere preponderance of proof is sufficient. We believe that the gravity of the charge requires clear and cogent evidence—that is, evidence that urges the mind irresistibly to the conclusion of the truth of the allegations. The citations appended hereto are, the most of them, causes in which the action stands in relation to similarity of proof with criminal actions, on much the same footing as adultery.[45] In a Connecticut case, which is in

[43] 129 Mass. 474.
[44] Dobbs v. Dobbs, 3 Edwards, 378, and note thereto.
[45] Bryant v. Simoneau, 51 Ill. 324; Matthews v. Huntley, 9 N. H. 150; Clare v. Clare, 19 N. J. E. (4 C. E. Green), 37; Mount v. Mount, 15 N. J. E. (2 McCarter), 162; Day v. Day, 3 Green Ch. (N. J.) 444; State v. Boswell, 6 Conn. 446; Marksbury v. Taylor, 10 Bush (Ky.), 519; Gordon v. Parmalee, 15 Gray, 413; Wright v. Hardy, 22 Wis. 348; Strader v. Mullane, 17 Ohio St. 624; Ellis v. Bizzell, 60 Me. 209; Matter of Vanderveer, 20 N. J. E. 463; Knowles v. Scribner, 57 Me. 497; Ford v. Chambers, 19 Cal. 143; McDaniel v. Baca, 2 Cal. 326; Ellis v. Lindley, 38 Iowa, 461; King v. Fitch, 2 Abb. Ct. App. 508; s. c., 1 Keyes, 432; May on Insurance, sec. 583. Different degrees of pre-

conformity with what seems by a majority of decisions to be the determined and true rule of law, the court, Ellsworth, J., after quoting at length from Starkie, continues: "In *crim. con.*, in actions for seductions, and in petitions for divorce for adultery or other criminal conduct, the crime is of course to be proved, if the plaintiff expects to succeed. Still, the proceedings are not criminal, nor do the cases fall within that classification for any purpose whatever."[46] Though Hinman, J., argues: "But I do not concur in the view that there is in law any distinction between civil and criminal cases, in respect to the amount of evidence which ought to be required by a court or jury in order to find a fact." One judge dissented from the opinion of the court. Closely analogous is the case of Freeman v. Freeman.[47] The opinion given therein would seem to set at rest the question of what is a reasonable doubt in cases of this kind. The court, referring to Berckmans v. Berckmans,[48] continues: "The evidence must be such as to satisfy the human mind, and leave the careful and guarded judgment of the court free from any conscientious and perplexing doubts as to whether the charge be proved or not. If, after a careful examination of all the competent testimony such doubts remain immovable, it is clearly our duty to give the defendant the benefit of such doubts,"[49] citing the cases appended.[50] In Sinclair v. Jackson,[51] it is held that in a civil cause, where crime is alleged and an issue is raised thereupon, proof beyond reasonable doubt is necessitated; but *contra*, where such issue is not raised. So, in an allegation of intent involving charge of crime, proof beyond reasonable doubt was required.[52]

The law, as expounded in Mix v. Woodward,[53] by Bissell, J.,[54] when compared with the cause of Munson v. Atwood, *ante*, seems to require explanation, if the underlying principle in favor of a presumption of innocence be the same.

As to what shall be conclusive presumptions of law or of fact in this action, is a position which can not be considered at length in so short an article as this. But statements of a few facts, which have furnished bases for these conclusions, may be not valueless. Where the acts proven could not be reconciled with innocence, and the coincidences in testimony are such that the conclusion of guilt must logically ensue, held satisfactory.[55] The same conclusion was reached where the husband was found in a room with a woman of bad character for chastity, in an equivocal position that established the presumption of adulterous intercourse between them.[56] In Marsh v. Marsh,[57] it was declared that a "judgment of divorce should never be pro-

sumptive evidence, Decker v. Somerset Ins. Co., 66 Me. 406. General principle discussed. 1 Stark. on Ev. (6th ed.), secs. 510-513. In addition to above cases, see 2 Greenl. on Ev. (13th ed.), sec. 426, and note. See, also, vol. 1, sec. 13, *a*, and vol. 3, sec. 29 of same.

46 Munson v. Atwood, 30 Conn. 102.

47 31 Wis. 235.

48 17 N. J. E. (2 C. E. Green), 454.

49 Decker v. Somerset Ins. Co., cited above.

50 Adams v. Adams, 17 N. J. E. (2 C. E. Green), 324; Jones v. Jones, Id. 351; Reid v. Reid, Id. 101; Bray v. Bray, 2 Halst. Ch. 506; Larrison v. Larrison, 20 N. J. E. (5 C. E. Green), 100; Flavell v. Flavell, Id. 211; Alexander v. Alexander, 2 Swab. & Y. 95.

51 47 Me. 102.

52 Paul v. Currier, 53 Me. 526; Thayer v. Boyle, 30 Me. 475. See, further, Fountain v. West, 23 Iowa, 1; Clark v. Dibble, 16 Wend. 601.

53 12 Conn. 262.

54 The following cases are relied on in his opinion: Chalmers v. Shackell, 6 C. & P. 475, said in Greenl. on Ev., sec. 427, note, to be doubtful authority in England; Root v. King, 7 Cow. 618; s. c. 4 Wend. 113; Stow v. Converse, 4 Conn. 17.

55 Jones v. Jones, 17 N. J. E. (2 C. E. Green), 351, *de* sufficient proof; Bray v. Bray, 6 N. J. E (2 Hal.) 506, insufficient; Cummins v. Cummins, 15 N. J. E. (2 McCarter), 138, insufficient; Adams v. Adams, 17 Id. 324; Wood v. Wood, 2 Paige, 108; Trust v. Trust, 11 How. Pr. 523; Reemie v. Reemie, 4 Mass. 586; Mulock v. Mulock, 1 Edw. 14; Anderson v. Anderson, 1 Green, 100; Kirby v. State, 3 Humph. (Tenn.) 289; Daily v. Daily, Wright, 514; Scroggin v. Scroggin, Wright, 212; Herrick v. Herrick, 31 Mich. (9 Post), 298; insufficient. Acts were testified to by alleged paramour, who was shown to be unworthy of credit, and the other testimony was contradictory. Washburn v. Washburn, 5 N. H. 195; Harris v. Harris, 2 Hag. (4 Eng. Ec. 169) 376, *et seq.*; evidence of disposition and opportunity. Elwes v. Elwes, 1 Hag. (4 Eng. Ec. 401) 269; D'Aguilar v. D'Aguilar, 1 Hag. Ec. 777; Chambers v. Chambers, 1 Hag (4 Eng. Ec. 445) 439; Astley v. Astley, 1 Hag. 714. In this case the court said: "A woman going to a brothel with a man furnished conclusive proof of adultery. On this last point see Ricketts v. Taylor, referred to in Williams v. Williams, 1 Hag. (4 Eng. Ec. 417) 299; Richardson v. Richardson, 1 Hag. 6; Westmeath v. Westmeath, 2 Hag. Ec. (4 Eng. Ec.) 160; Rutton v. Rutton, quoted in Cadogan v. Cadogan, *ante*; Grant v. Grant, 2 Curt. (7 Eng. Ec. 3, 15), 7, 16, 55; Rix v. Rix, 3 Hag. (5 Eng. Ec. 21) 84; Heathcote's Divorce Bill, 1 Macq. Scotch App. Cas. 277; Caton v. Caton, 13 Jur. 431, *et seq.*; Gould v. Gould, 2 Atkins, 180; 2 Bish. on M. & D. (4th ed.), secs. 615-626, and notes.

56 Langstaff v. Langstaff, Wright, 148; Ciocci v. Ciocci, 26 Eng. L. & E. 604; Astley v. Astley, 1 Hag. 714.

57 28 N. J. E. (1 Stew.) 196.

nounced on doubtful proofs;" and that undue intimacy, existence of the necessary intent, correspondence coupled with admissions of defendant, would entitle complainant to a decree. Again, the well-known cause of Soilleux v. Soilleux[58] determined, that a disposition to commit the act, evidenced by violent acts of solicitation of chastity, coupled with apparent consent, as evidenced by the acts of the paramour and a suitable opportunity, were sufficient.

We have subjoined a few references of subjects which do not come properly within the scope of this article. They have been collected because they are so fully discussed.[59]

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[58] 2 Hag. (4 Eng. Ec. 434) 373.

[59] Connivance: Pierce v. Pierce, 15 Am. Dec. 210 *et seq.* See further on this subject, Rogers v. Rogers 3 Hag. (5 Eng. Ec. 14) 13. Opinion of Sir John Nicoll. Gipps v. Gipps, 11 H. L. 1, decided 1864; here secs. 29, 30, 31 of 20 and 21 Vic., ch. 85 are given. Also, see, 4 Jacob's Fisher's Dig., 6187, *et seq.* Bars: Rix v. Rix, 3 Hag. (5 Eng. Ec.) 21; Hodges v. Hodges, Id. 42; Hoar v. Hoar, Id. 51 (3 Hag.), 137; Lurton v. Lurton, Id. 130 (3 Hag. 338); Gower v. Gower, 4 Eng. Reporter, 657; Picken v. Picken, 34 L. J. (P. M. & A.) 22; Myers v. Myers, 41 Barb. 114; 2 Bish. on M. & D., sec. 6, (4th ed). Admissions as evidence, 30 Am. Dec. 544. Cruelty, what constitutes; Poor v. Poor, 29 Am. Dec. 674. Physical incapacity as ground of divorce; Devanbagh v. Devanbagh, 28 Am. Dec. 446-451. Decree rendered in State where neither of the parties resided. Litowitch v. Litowitch, 27 Am. Rep. 145 (S. C. 19 Kan. 451). Divorce procured in another State. People v. Baker, 76 N. Y. (31 Sickells) 78; Hanover v. Hanover, 7 Am. Dec. 203 and note 206. But see Medway v. Needham, 8 Am. Dec. 131, note 133; Harteau v. Harteau, 25 Am. Dec. 372, note 377; Tolen v. Tolen, 21 Am. Dec. 742, note 747, *et seq.*

COMMENTS OF A JUDGE UPON THE EVIDENCE.

The charge of the judge has been defined by Bouvier to be: "The exposition by the court to the jury, of those principles of the law which the latter are bound to apply, in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit."[1] The idea to be collected from this definition, then, would be, that the court had the power of instructing the jury only in relation to the law applicable to the facts proved, and in the law only. Strictly speaking, this is so; but practically, the court uses his own discretion in commenting upon the weight of testimony in the case. However, a few concise statements of the law as applicable to the facts in the case, is all that should be required, and in fact all that can serve any purpose whatever in the elucidation of the case.[2] There has been some discussion among writers upon the subject, whether a judge, in his instructions to the jury, should comment upon the testimony, and direct which should be credited and which not. It would seem the just rule should be, as the jury are judges of fact, they should also determine whether the witnesses called to prove or disprove a fact were worthy of belief. The credibility of witnesses and the weight of testimony are questions of fact for the jury, and they have a right to determine from the appearance of the witnesses upon the stand, the manner in which they testify, their intelligence or lack of knowledge, whether they are worthy of belief.[3] The common-law rule was that, in addition to the instructions given by the court to the jury of the law in the case, he might also charge them as to the weight of the testimony adduced, and comment upon it to almost an unlimited extent; provided, that he distinctly stated that, notwithstanding his opinion, it was a question of fact for the jury, and to be decided by them.

Juries place great reliance upon the opinion of the court, and it is easy to see, if he were biased in the least, he might instruct the jury in such unmistakable terms as to the degree of belief with which they should regard the evidence or the testimony of particular witnesses, and still keep within the bounds of the law by charging that the credibility of witnesses is a question of fact for the jury. This rule has been followed quite closely in a few late cases, and it may be said the rule is well settled that the court may include in his charge an opinion upon the weight of evidence, where the question is left to the jury.[4]

[1] Bouv. Law Dic., Charge.

[2] Adams v. Smith, 58 Ill. 417; Trish v. Newell, 62 Ill. 196; State v. Mix, 15 Mo. 153.

[3] Wallace v. State, 28 Ark. 531; Holloway v. Commonwealth, 11 Bush, 344; Stampofski v. Steffens, 79 Ill. 303; Dunlop v. Patterson, 5 Cow. 243; Conrad v. Williams, 6 Hill, 444; Woodin v. People, 1 Parker's Cr. Rep. 464.

[4] Swift v. Stevens, 8 Conn. 431; Cook v. Brown, 34

In England a case involving this question arose, and Coltman, J., said: "The learned judge seems to have made strong observations, but not stronger than he was justified in making."[5] The United States Supreme Court, in passing upon the question, say: "The principle is well established that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion in regard to facts. When a matter of law is given by the court to the jury, it should be considered as conclusive; but a mere matter of opinion as to the facts will only have such an influence on the jury as they may think it entitled to."[6] In a Michigan case, the court below charged the jury as follows: "Now, gentlemen, those two witnesses, as you have seen them on the stand, it is a question for you to say whether you will put any credit whatever in their testimony. If I were in your places, I should discredit their testimony entirely, but with that I have nothing to do; I am not in your places, but I am charging you upon the law of the case." He had previously charged that they were to pass upon the credibility of all the witnesses. It was held no error to thus charge.[7] But in Pennsylvania it was held, that an instruction that, if the judge were in the jury box, certain testimony would control him in giving his verdict against the plaintiff, was erroneous, although accompanied by the caution that the jury were judges of fact.[8]

It is erroneous to charge that the testimony of one witness, corroborated by other evidence, is more credible than the testimony of another, or to instruct the jury that one set of facts in evidence tends to establish a certain conclusion, rather than another combination of circumstances;[9] or, in a case where oral evidence and depositions have been introduced to instruct the jury as follows: "You have a right to look at the appearance of the witnesses upon the stand, and, because of this, other things being equal in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions."[10]

It is not proper for the court to make remarks in the hearing of the jury calculated to influence their finding, and if he should do so, it would be good ground for reversal.[11]

The end of law is to preserve purity in the trial and to secure to every one his rights, in order that justice may be done; but it must be admitted that the rule, allowing the judge to express his opinion upon the weight of evidence, is liable to great abuses, and often we see a judge who so far forgets himself as to prejudice one side or the other. The only way to check the evil is to impose restrictions upon this power. A judge might instruct the jury upon the weight of evidence upon one side of a case and entirely disregard that upon the other, although it be of the same nature as that commented upon, and still there would be no remedy. The rule grew out of the English practice, where a jury was supposed not to have capacity to weigh the evidence without aid from the court, and it has been adopted here without considering the desirability of intrusting a wider province to them. The rule, however, must be taken as we find it, and it is too well established to be overthrown. It has advantages, like all institutions; as, for instance, the court, in charging the jury, may think of some point which escaped the mind of counsel, or *vice versa*; and, if it is based on facts in the case, stating it to the jury will not be grounds for a new trial.[12]

For some of the duties of a judge in commenting upon the evidence in his charge, several courts have endeavored to lay down rules, and to these the reader is referred.[13]

N. H. 460; Clark v. Tabor, 28 Vt. 223; Dunlop v. Patterson, 5 Cow. 243; Commonwealth v. Child, 10 Pick. 252; Gale v. Spooner, 11 Vt. 152; Stevens v. Talcott, Id. 25; Tracy v. Swarthout, 10 Pet. 80; Taylor v. Ashton, 11 M. & W. 400; N. Y. Fireman's Ins. Co. v. Walden, 12 Johns. 513; People v. Quinn, 1 Parker's Cr. Rep. 340; Bulkeley v. Keteltas, 4 Sandf. 450; Miller v. Eagle & Health Ins. Co., 2 E. D. Smith, 268; Cumpston v. McNair, 1 Wend. 457; Hall v. Suydam, 6 Barb. 83; People v. Rathbun, 21 Wend. 509; Lyons v. Summers, 7 Conn. 399; Pennock v. Dialogue, 2 Pet. 15.

[5] Davidson v. Stanley, 2 M. & G. 721.

[6] Games v. Stiles, 14 Pet. 322.

[7] Sheahan v. Barry, 27 Mich. 217.

[8] Burke v. Maxwell, 81 Pa. St. 139.

[9] Lundt v. Hartrunft, 41 Ill. 10; Chittenden v. Evans, Id. 251.

[10] Millner v. Eglin, 64 Ind. 197.

[11] Skilly v. Boland, 78 Ill. 438; Fuhrman v. City of Huntsville, 54 Ala. 263; Wannack v. Mayer, 53 Ga. 162; Hasbrouck v. City of Milwaukee, 21 Wis. 217.

[12] Sawyer v. Merrill, 6 Pick. 478.

[13] Prairie State, etc. Co. v. Doig, 70 Ill. 52; Frame

To charge the jury judiciously in each particular case, so that nothing which may be charged by the court will influence the jury and preserve the rights of the parties, is a task of no ordinary difficulty, and courts often err; but it may be safely stated that there will be fewer appeals and a less number of new trials granted, where the court strictly abstains from expressing an opinion upon the evidence, except to the extent required to explain the law applicable to the case.

ADDISON G. MCKEAN.

v. Badger, 79 Ill. 441; Evans v. George, 80 Ill. 51; Ketchum v. Ebert, 33 Wis. 611; McCorkle v. Simpson, 52 Ind. 453.

ATTORNEY AND CLIENT— PURCHASE OF PROPERTY IN LITIGATION.

ROGERS v. MARSHALL.

United States Circuit Court, District of Colorado, December 5, 1881.

1. The question whether an attorney-at-law can, under any circumstances, purchase, *pendente lite*, from his client, the subject-matter of litigation, in which he is employed and acting, suggested, but not decided.

2. Equity will not uphold such a sale, even upon a showing of good faith, where it appears that the attorney, while negotiating for the purchase of the property, was, at the same time, advising the client as to the probable outcome of the litigation concerning it.

3. It is contrary to law and equity to permit an attorney, at the same time and in the same transaction, to occupy the antagonistic and incompatible positions of adviser of the client, concerning the pending litigation threatening his title to property, and of purchaser of such property from him.

4. Some of the rules regulating dealings between client and attorney stated. The former must make full disclosure of every fact which might influence the decision by the client of the question of the sale. All presumptions are against the attorney.

5. If an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney, yet if, instead of openly purchasing it, he purchases it in the name of a third person, without disclosing the fact, the purchase is void; and the same rule prevails where the attorney, while professing to purchase for himself, really purchases in part for his client's copartners and suppresses the fact.

6. Where an attorney purchases from his client in his own name, but in secret trust for third parties, to whom he subsequently conveys, such third parties stand in his shoes, taking the chances as to the validity of the purchase.

This was a suit in equity, brought to set aside the sale and conveyance from complainant to respondent Marshall, of a valuable mining property in Colorado, known as the "Robert E. Lee Mine." The purchase of the property was effected by respondent Marshall, who took the title in his own name, while he was an attorney for the complainant in a certain litigation concerning the title to the property. His purchase was, in fact, for himself, and certain of the other respondents who were previously part owners with complainant in the mine, and the fact that the latter were interested in the purchase was not disclosed to complainant. There was proof tending to show that Marshall gave to an agent of the complainant such information as he possessed concerning the value of the mine, and advised said agent to ascertain the facts for himself, but did not advise the employment of an expert to make an examination, and estimate the value, of the mine, although complainant's agent was not himself an expert. While negotiating for the purchase, and as part of such negotiation, Marshall advised complainant concerning the probable ontcome of the pending litigation, in which he was her counsel. The price paid complainant for her interest was $45,000, while the testimony tends to show that the real value of the same was over half a million.

L. S. Dixon, for complainant; *Wells, Smith & Macon*, for the respondent.

MCCRARY, Circuit Judge, delivered the opinion of the court:

1. It is not necessary to decide the question whether an attorney-at-law can, under any circumstances purchase *pendente lite* from his client, the subject-matter of a litigation, in which he is employed and acting.

2. Equity will not uphold such a sale, even upon a showing of good faith, where it appears, as in this case, that the attorney, while negotiating for the purchase of the property, was, at the same time, and as part of the negotiations, advising the client as to the probable outcome of the litigation concerning it.

It is difficult to see how it is possible for an attorney, under such circumstances, to deal with his client at arm's-length; for the client's acceptance or rejection of any proposition for a purchase by the attorney must depend upon the nature of the advice he receives from him touching the pending litigation. In other words, the attorney must, as to an important part of the negotiation, represent both sides; that is his own private interest, and the opposing interest of his client, a thing which s manifestly contrary to law and abhorrent to equity.

The client must, in such cases, act upon the attorney's advice and opinion as to the merits of the pending litigation about the property, and by the light of such advice he must fix the price at which he will sell. Even if under some circumstances the property in controversy in a suit may, pending the suit, be sold by the client to the attorney, I

am of the opinion that a court of equity ought to hold that such a sale is absolutely void, if the attorney, while negotiating as a purchaser, is called upon to advise the client, as an attorney, as to how far a pending litigation is likely to affect his title to the property, or the value of his interest therein.

It is contrary to the policy of the law, and certainly contrary to the principles of equity, to permit an attorney-at-law to occupy, at the same time and in the same transaction, the antagonistic and wholly incompatible position of adviser of his client concerning a pending litigation, threatening the client's title to property, and that of purchaser of such property from the client. If an attorney can deal with his client concerning such property at all, he must,before doing so, for the time at least, divest himself of the character of attorney, so that his former client may deal with him as a stranger. This is not the case when the attorney negotiates with the client as the purchaser of such property, and at the same time advises him as counsel concerning the title to it, or concerning its value, as affected by pending litigation.

3. To sustain a sale from client to attorney, the burden is upon the latter, and he must show that he has done as much to protect the client's interests as he would have done in the case of his client's dealing with a stranger,

The court will watch such a transaction with jealousy, and throw on the attorney the burden of proving that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser.

An attorney can not in any case sustain a purchase from his client without showing that he communicated to such client everything necessary for him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling for the price offered. And neglect of the attorney to inform himself of the state of facts will not enable him to sustain a purchase from his client for an inadequate consideration.

The attorney must show that all the considerations which should have operated to prevent the sale by the client were presented by him with the earnestness of a man who was anxious only for the client's good.

It must be made to appear that the client is no worse off than he would have been, had he consulted an adviser who had no interest and no selfish end in view. It must appear also that the attorney took such measures to inform himself as to the value of the property offered for sale by the client, as are ordinarily taken by persons dealing in such property under like circumstances, and that,being himself thereby informed, he communicated all his information upon the subject to his client. Authorities by which these general rules are established will be found cited in "Weeks on Attorneys-at-Law," under the head of "Dealings between Attorney and Client," pp. 450 to 469, and in "White and Tudor's Leading Cases in Equity, Hare and Wallace's Notes, volume 2, part 4, pp. 1216 to 1225. It does not, in my opinion, appear that respondent Marshall cautioned and advised his client, the complainant, as fully as the law, as above set forth, required.

An attorney who knows nothing of the value of property offered for sale by his client, and is aware that his client is in like ignorance upon that subject, is bound, before advising a sale by the client to a stranger, and *a fortiori* before attempting to purchase from the client himself, to make careful inquiry and to inform himself as fully as possible concerning such value. If a stranger had appeared and opened negotiations with complainant for the purchase of her interest in the mine, and she had applied to Marshall, as her attorney, for advice concerning the sufficiency of the price offered, it would have been his duty, being himself ignorant upon the subject,to advise an investigation by a competent person, as a means of ascertaining the probable or approximate value of the property.

It is true that Marshall had, up to the time when the negotiations for a purchase by him commenced, been the attorney of complainant, only for the purpose of defending her title, and having no occasion to inquire into the question of the value of the mine; but the moment these negotiations were opened, the relation was changed, and it became his duty to use due diligence to ascertain the value of the property as nearly as possible, and to advise complainant or her agent. It was at least his duty to suggest an investigation by the usual method. If he had, without knowledge as to the value of the property, and without suggesting an investigation, advised a sale to a third party at a price which proved to be inadequate, it is clear that he would have failed in his duty, and it is equally clear that he could not purchase under like circumstances.

His own ignorance as to the value of the property, so far from being a circumstance in his favor, was a strong reason for holding that he was bound to inform himself so as to be able to advise his client.

4. I hold, further, that the respondent Marshall, before consummating his purchase from complainant, was bound to disclose to her, or her agent, the names of all persons interested with him in the purchase, and especially that her partners in the mine were secretly interested as such purchasers.

The rule is, that the attorney must make a full disclosure of every fact which might influence the decision by the client of the question of the sale. All the presumptions are against the attorney.

The court can not presume that the fact that her partners were secret purchasers with Marshall, would have had no influence upon complainant's mind if disclosed. If it had been known by her that her copartners wished to purchase part of her

interest, and yet did not wish her to know the fact, and had therefore employed Marshall to purchase in his own name for them, it might well have aroused suspicion in her mind, and very probably would have led her to decline to sell, or caused her to employ other counsel, or to institute further inquiry as to the character and value of the property. It has been held that, if an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney, yet if, instead of openly purchasing it, he purchases it in the name of a third person without disclosing the fact, the purchase is void. Weeks on Attorneys at Law, p. 463, and cases cited.

The same rule must prevail where the attorney, while professing to purchase for himself from his client, really purchases in part for his client's copartners and suppresses this fact.

5. The parties interested with Marshall in the purchase, and who afterwards took conveyances from him, stand in his shoes, so far as the complainant's rights are concerned. They knew that the relation of attorney and client existed between complainant and Marshall, and they took the chances as to the validity of the latter's purchase. If the sale is void as to him, it is also void as to them; and in that case it is unnecessary to inquire into the allegations or examine the proofs as to the misconduct on the part of complainant's failures in connection with the sale in question.

When an attorney purchases from his client in his own name, but in secret trust for third parties, it will not, of course, be insisted that such third parties can be regarded as innocent purchasers, or as entitled to any greater rights or better title than the attorney himself secures.

NOTE.—The doctrine of the foregoing case is far-reaching in its effect, and amply supported bp authority.

When an attorney purchases, *pendente lite* from his client, the subject-matter of a litigation in which he is employed, a presumption of bad faith arises, and the burden of proof is upon the attorney to show the entire fairness and the utmost good faith of the transaction, and that no advantage was taken of the client; otherwise the purchase must fall. This proposition is so well-established, both upon principle and authority, that it is scarcely necessary to cite the cases supporting it.

The leading case upon the subject of purchases by persons thus occupying confidential relations towards the vendor, is probably Fox v. Mackreath, 1 Lead. Cas. in Eq., part 1; White & Tudor, (4th Am. ed.), 188, p. 115. There the court held that a purchase by a trustee for sale from his *cestui que trust*, although he may have given an adequate price and gained no advantage, should be set aside at the option of the *cestui que trust*, unless the connection between them had been dissolved, and the knowledge of the value of the property acquired by the trustee had been communicated to the *cestui que trust*. Exhaustive notes are added to the report of this case by the very able editors, and most of the cases relating to purchases by persons occupying confidential and fiduciary relations, are reviewed. "The great principle by which courts of equity are governed in such cases, is this, that he who bargains in matters of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. This rule in its principle applies equally to parents, guardians, trustees, pastors, medical advisors and all others standing in confidential relations with those with whom they treat. The burden of proof is devolved in equity on such persons to establish affirmatively the perfect fairness, adequacy and equity of their respective claims." 3 Greenl. on Ev. (Redf. ed.), sec. 253; 1 Story Eq. Jur. (11th ed.), sec. 311.

The rule, as thus stated, has been applied to trustees, parents, guardians, receivers, assignees in bankruptcy and insolvency, directors of associations and corporations, medical and spiritual advisers, and many others, including the class known as attorneys. See note to Fox v. Mackreath, *supra;* 3 Greenl. on Ev. (Redf. ed.), sec. 253, note 3. The expression "attorneys" may be regarded as comprehending all grades of practicing lawyers, such being the sense in which the term is used in the United States, the old distinctions as to barristers, advocates, etc., being obsolete. Weeks on Attorneys at Law, p. 61, sec. 35; Wharton on Agency, sec. 555.

The confidential nature of the relation between attorney and client gives the attorney such an opportunity to exercise an influence over his client, not possible otherwise, that the courts do not hesitate to declare transactions between them void, which, as between parties occupying other relations, would be entirely unobjectionable. Cook v. Berlin Woolen Mill, 43 Wis. 433; Mills v. Mills, 26 Conn. 213; Payne v. Avery, 21 Mich. 524; Bibb v. Smith, 1 Dana (Ky.), 582; Starr v. Vanderheyden, 9 Johns. 253. It was well said by Chancellor Westbury: "There is no relation known to society, of the duties of which it is more incumbent upon a court of justice to strictly require a faithful and honorable observance, than the relation between solicitor and client." Tyrrell v. Bank of London, 10 H. L. C., 26, 43.

The unbroken current of authority establishes the statement of law made at the head of this note, and many of the cases go even beyond it, and hold that a purchase by an attorney from his client can, under no circumstances, be maintained. Gibson v. Jeyes, 6 Ves. 266; Tyrrell v. Bank of London, 10 H. L. C. 26, 43; McPherson v. Watt, 3 Ap. Cas. H. L. & P. C. 254; s. c., 24 Moak, 174, 190, 191; Carter v. Palmer, 8 Cl. & F, 657; Salmon v. Cutts, 4 DeG. & Sm. 125, affirmed 16 Jur. 623; Pearson v. Benson, 28 Beav. 598; Gresley v. Mousley, 4 DeG. & J. 78; *Ex parte* James, 8 Ves. 348; Newman v. Payne, 2 Id. 199; Welles v. Middleton, Cox's Cas. in Eq. 112; Billage v. Southee, 9 Hare, 534; Hunter v. Atkyns, 3

M. & K. 113: Harris v. Prementure, 15 Ves. 40; Wright v. Proud, 13 Ves. 138; Rhodes v. Bate, L. R. 1 Ch. Ap. 252; Bellew v. Russell, 1 Ball & Beatty, 96; Hall v. Hallett, 1 Cox, 134; note to Fox v. Mackreath, *supra*; Howell v. Ransom, 11 Paige, 540; Jennings v. McConnel, 17 Ill. 148; Hawley v. Cramer, 4 Cow. 717; Evans v. Ellis, 5 Denio, 643; Gray v. Emmons, 7 Mich. 533; Miles v. Ervin, 1 McCord, (S. C.) Ch. 524; McMahan v. Smith, 6 Heisk. (Tenn.) 167; Kisling v. Shaw, 33 Cal. 425; Wright v. Walker, 30 Ark. 44; Ryan v. Ashton, 42 Iowa, 365; Roman v. Mali, 42 Md. 513; 1 Perry on Trusts, § 166; Harper v. Perry, 28 Iowa, 60; Trotter v. Smith, 59 Ill. 244; Howell v. Baker, 4 Johns. Ch. 120; Wade v. Pettibone, 11 Ohio, 60; Case v. Carrol, 35 N. Y. 388; Manning v. Hayden, 5 Sawyer C. C. 360; Baker v. Humphrey, 101 U. S. 494; and see especially, Weeks on Attorneys at Law, sections 268 to 277, where the subject is learnedly discussed.

In one of the early cases, Lord Eldon laid down the general principle regarding the right of an attorney to purchase from his client property pending litigation, in the following language: "An attorney buying from his client, can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for the vendor with a stranger. If it appear that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage, with due diligence he would have prevented another person from getting, a contract under such circumstances shall not stand. * * * * If an attorney does mix himself with the character of vendor, he must show to demonstration,—for this must not be left in doubt,—that no industry he was bound to exert, would have got a better bargain." Gibson v. Jeyes, 6 Vesey, 266.

The principle which Lord Eldon thus settled, was in effect this, that when the confidential relation of attorney and client existed, the duty was incumbent upon the attorney to make the best possible disposition of his client's interest; and if he failed in this, he was derelict in his duty. If he sold without the exercise of diligence in knowing the true value of property, he would be guilty of negligence and responsible to his client; therefore, upon selling to himself, it would not lie in his mouth to say that he did not know the value of the property. Such appears to be the true rule. Greenlaw v. King, 3 Beav. 49; *In re* Bloye's Trusts, 1 Mac. & G. 488; Grover v. Hugell, 3 Russ. 428; White v. Whaley, 3 Lans. (N. Y.) 327; Howell v. Ransom, 11 Paige, 540; Weeks on Attorneys at Law, 458, sec. 273. And thus before purchasing, the attorney is bound to disclose to his client all the information he possessed, or could have obtained upon the subject; and upon purchasing must pay a fair and adequate price. Coffee v. Ruffin, 4 Cold. 487; Michoud v. Girod, 4 How. 503; Brook v. Berry, 2 Gill, (Md.) 99; Keighler v. Savage Mf'g Co., 12 Md. 383; Puzey v. Seiner, 9 Wis. 370; Weeks on Attorneys at Law, sec. 273. Chancellor Walworth, in Howell v. Ransom, *supra*, in treating of this subject, said: "The attorney, therefore, can never sustain a purchase of this kind, without showing that he communicated to his client everything which was necessary to form a correct judgment of the actual value of the subject of the purchase, and as to the property selling at the price offered; and his neglect to ascertain the true state of facts himself, will not sustain his purchase." As expressed in apt terms by Lord Blackburn, in all such cases the attorney must put himself at arm's length from his client. McPherson v. Watt, 3 App. Cas. H. L. & P. C. 254.

It must follow, that since the rule is so strict as to sustaining purchases by attorneys from their clients, the probabilities being that an attorney, who would conceive the purpose to defraud, would not disclose it, nor show that he did in fact act in bad faith, a suspicion of distrust and disbelief naturally follows. *Ex parte* Lacey, 6 Ves. 627; Coles v. Trecothic, 9 Ib. 234; Phillips v. Homphrey, L. R. 6, Ch. App. 770. It may be observed, as was held by Chancellor Kent, in Davude v. Fanning, 2 Johns. Ch. 252, that there may be fraud and a party not able to prove it; therefore, to guard against this uncertainty and hazard of abuse, the sale is declared void at the option of the client, upon the very slightest proof. For this reason, it is not necessary to prove any actual fraud. Weeks on Attorneys at Law, sec. 268.

The presumption of bad faith continues as long as the relation of attorney and client exists; and when the actual relation is completely dissolved, and the parties are no longer under the antecedent influence, the rule ceases. Gibson v. Jeyes, 6 Ves. 266; Rose v. Mynatt, 7 Yerg. (Tenn.) 30; Phillips v. Overton, 4 Hayw. (Tenn.) 291; Mason v. Ring, 3 Abb. Ct. of App. (N. Y.) 210. Yet, while this is so, the rule does not lose its application while the *influence* remains, even though the relation has been technically dissolved. Mason v. Ring, 3 Abb. Ct. of App. (N. Y.) 210; Coffee v. Ruffin, 4 Coldw. 487; Rhodes v. Bate, 1 L. R. Ch. App. 252; Gibbs v. Daniels, 4 Giff. 1; Zeigler v. Hughes, 55 Ill. 288; Weeks on Attorneys at Law, sec. 273, p. 457.

Even where the purchase by an attorney from his client is sustained, it is only upon the ground that the transaction was free, open and unreserved; and therefore, if it appear that there was any underhand dealing, such as the purchase in the name of a third person, without the fact being disclosed to the client, the transaction will not be sustained. Weeks on Attorneys at Law, 463, sec. 275; Lewis v. Hillman, 3 H. L. C. 607. See, also, Murphy v. O'Shea, 2 Jones & Lat. 422; Charter v. Trevelyan, 11 Cl. & F. 714; Walsham v. Stainton, 1 DeG., J. & Sm. 678; Abbott v. American Ins. Co., 33 Barb. (N. Y.) 278; Forbes v. Halsey, 26 N. Y. 53. So, if the negotiations between the attorney and

client have been carried on in a third person's name, the latter being at the time interested with the attorney, the purchase must fall. Zeigler v. Hughes, 55 Ill. 288.

The attorney, who is under a disability to purchase for himself, is likewise inhibited from purchasing for another. Remick v. Butterfield, 11 Foster (N. H.), 70; Cumberland Coal Co. v. Sherman, 30 Barb. (N. Y.) 553; Brackenridge v. Holland, 2 Blackf. 377; Martin v. Wyncoop, 12 Ind. 266. This for the obvious reason that the influence will operate upon the client, and the purchaser takes the property subject to the acts of the attorney in buying, who, in fact, acts for him. O'Dell v. Rogers, 54 Wis. 136; Hoffman, etc. Co. v. Cumberland, etc. Co., 16 Md. 456; McPherson v. Watt, 3 App. Cas. H. L. & P. C. 254. So, should an attorney sell for his client, and soon thereafter obtain a conveyance from the purchaser to himself, a court of equity would regard the transaction with great jealousy, and set the whole proceedings aside, upon slight proof; yet this presumption of bad faith may be repelled. Obert v. Obert, 2 Stock. Ch. 98; Cook v. Berlin Woolen Mill, 43 Wis. 433-441; Waterman v. Skinner, 1 Beas. 423; Rosenberger's Appeal, 2 Casey, 67; Bellamy v. Sabine, 2 Phil. 425.

The fact that the client is desirous of selling does not change the relations or rights of the parties. Gibson v. Jeyes, 6 Ves. 266; McPherson v. Watt, 3 Ap. Cas. H. L. & P. C. 254; McCormick v. Martin, 5 Blackf. 509; Gresley v. Mousley, 4 DeG. F. & J. 433.

It was urged, in the principal case, that under no circumstances could the purchase by an attorney from his client, of property pending litigation, be sustained. There are cases upholding this view, the reasons being that public policy requires the prohibition, so that there can be no opportunity for the perpetration of a wrong by the attorney. Note to Huguenin v. Baseley, 2 Lead. Cas. in Eq., pt. 2, White & Tudor, 1223; Harper v. Perry, 28 Iowa, 57; Hall v. Hallett, 1 Cox, 134; Wright v. Walker, 30 Ark. 44; *Ex parte* Bennett, 10 Ves. 381; *Ex parte* James, 8 Ib. 337; Gillett v. Gillett, 9 Wis. 194; Michoud v. Girod, 4 How. (U. S.) 506; *In re* Taylor Orphan Asylum, 36 Wis. 552; Starr v. Vanderheyden, 9 Johns. 253; Torrey v. Bank of Orleans, 9 Paige, 649; Atkins v. Delmege, 12 Ir. Eq. 1; and the cases cited in counsel's brief to Cook v. Berlin Woolen Mill, 43 Wis. 439, on page 437 of the report.

Probably the better rule is, that such transaction is not necessarily void, but the burden is upon the attorney to show its validity, under the principles stated. The question was recently presented to the Supreme Court of the United States, in the case of Pacific R. Co. v. Ketchum, 101 U. S. 289, where it was held, that the purchase by a solicitor of a railroad company of its property at a judicial sale was not of itself invalid. Chief Justice Waite said: "If there had been any proof of collusion or improper conduct on the part of the solicitor, resulting in a wrong to the company, the case would be different. As it is, we are called upon to decide whether a purchase in the name of a solicitor of one whose property is sold, is necessarily, in and of itself, invalid. We think it is not. It will be scrutinized closely, but until impeached must stand. Slight circumstances may impeach it, but it is not under all circumstances invalid." It may be noticed that there the purchase was made at a judicial sale, but the same rule has been applied to private purchases. Coffee v. Ruffin, 4 Coldw. 487; Hess v. Voss, 52 Ill. 472; Nesbit v. Lockman, 34 N. Y. 167; Kisling v. Shaw, 33 Cal. 425; Miles v. Ervin, 1 McCord, Ch. (S. C.) 524; Roman v. Mali, 42 Md. 513. See also Spindler v. Atkinson, 3 Md. 409; Buell v. Buckingham, 16 Iowa, 284; Delemater's Estate, 1 Wharton, 363; Wendell v. Van Rensselaer, 1 Johns. Ch. 342; Weeks on Attorneys at Law, 459, sec. 273; Story Eq. Jur., sec. 311; and note to Fox v. Mackreath, *supra*, 260.

Whatever may be the correct principle, it must be that the sale is not absolutely void, but only voidable at the option of the client. Therefore if, after a full knowledge of all the circumstances, the client shall elect to confirm the sale to the attorney, and the influence no longer exists, such election will be held binding. McCormack v. Martin, 5 Blackf. 509; Williams v. Reed, 3 Mason. 405; note to Fox v. Mackreath, *supra*, 257. And it has been held that no one but the client can avoid the sale. Leach v. Fowler, 22 Ark. 143; Wall v. Cockerell, 10 H. L. C. 229. And so in the following cases, where a trustee purchased, it was held that a stranger could not avoid the sale. Jackson v. Van Dalfsen, 5 Johns. 43; Rice v. Cleghorn, 21 Ind. 80; Remick v. Butterfield, 11 Foster (N. H.) 70; Jackson v. Walsh, 14 Johns. 407; Wilson v. Troup, 2 Cowen, 196. A subsequent grantee can not insist upon the rule. Cowan v. Barrett, 18 Mo. 247. And see Lathrop v. Wightman, 5 Wright, 297.

The principles herein set forth apply with equal force to transactions had by the client with the attorney's managing clerk. Poillon v. Martin, 1 Sandf. Ch. 560. And where a person acted as a confidential adviser in a suit before a magistrate, before whom attorneys did not appear, it was held that he so far filled the place of an attorney for the party for whom he acted, as to bring himself within the rule avoiding transactions between attorney and client. Buffalow v. Buffalow, 2 Dev. & Bat. (N. C.) Eq. 241. It is but reasonable that this should be so, for the same danger of undue influence over the client must necessarily exist. The client being a creature of confidence, the failure of the person acting as attorney, to have himself enrolled, ought not to change the rule. Trulove v. Cole, 41 Barb. (N. Y.) 318; Todd v. Grove, 33 Md. 183.

It may, however, possibly be, that the doctrine relating to privileged communications between attorney and client, as to whom the privilege extends to and the reasons therefor, would have some bearing upon this question. That sub-

ject is fully treated by Mr. Weeks, in his valuable work on Attorneys, at section 161, and it would extend this note to an unwarrantable length, to attempt here to state whether the doctrine would have any application, and, if so, to endeavor to define what persons would come within the principle.

FRANK HAGERMAN.

Keokuk, Iowa.

COMMON CARRIER— EXPRESS BUSINESS A PUBLIC NECESSITY.

SOUTHERN EXPRESS CO. v. ST. LOUIS, ETC. R. CO.

United States Circuit Court, Eastern District of Missouri.

1. That branch of transportation commonly known as the express business has, from law and usage, become a public necessity as conducted, and a common carrier is bound as such to receive and carry the packages of the express company and their custodian without dis- crimination.

2. While the court may not have power to fix beforehand the compensation for such services, it may compel the performance of such services and afterwards fix, by reference to a master, etc., the appropriate compensation for such services.

3. As to express matter the railroad company is not liable as common carriers, but only for the exercise of due care and skill.

This case, and those of the Southern Express Co. v. Memphis, etc. R. Co., Eastern District of Arkansas, Dinsmore v. Missouri, etc. R. Co., District of Kansas, Same v. Atchison, etc. R. Co., District of Kansas, and Same v. Denver, etc. R. Co., District of Colorado, were all heard at St. Louis together.

MILLER, Circuit Justice, delivered the opinion of the court:

In these cases argued before me at St. Louis, with Judges M'Crary and Treat, I can do no more than present certain general conclusions at which my mind has arrived, in regard to the propositions argued by counsel.

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized; that while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried, and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads; that the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage which, to a greater or less degree, attends the transportation of heavy and bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent, or messenger, of the person, or company, engaged in it; and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business, and of the rights which the public have to have the use of the railroads in this class of transportation.

3. I am of the opinion that, when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that, when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence, on the part of the railroad company.

4. That under these circumstances there does not exist, on the part of the railroad company, the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance, by special cars or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business. If the number of persons claiming the right to engage in this business at the same time on the railroad should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter, and the person in charge of it, should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties can not agree upon what that is, it is a question for the courts to decide.

7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use, necessary to that end.

8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and, after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railroad company to fix upon

a rate of compensation which is absolute, and insist upon the payment in advance, or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount so paid. And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the court to devise some mode of compensation to be paid as the business progresses, with the power of final revision on evidence, reference to master, etc.

12. I am of opinion that neither the statutes nor Constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies.

SUNDAY — CONTRACT FOR THE TRANSMISSION OF A TELEGRAPHIC MESSAGE.

ROGERS v. WESTERN UNION TEL. CO.

Supreme Court of Indiana, January 13, 1882.

A contract for the transmission of a telegraphic message made on Sunday is void.

ELLIOTT, C. J., delivered the opinion of the court:

This action was instituted by the appellant to recover the statutory penalty of $100 for the failure to transmit and deliver a telegraphic message. The defense is, that the message was placed in the hands of the appellee on Sunday, and the contract for its transmission made on that day. The theory of the appellee and of the trial court is that, as the contract for transmitting the message was made on Sunday, it is void, and no penalty can be recovered for the failure to perform a void contract. Appellant vigorously attacks the decisions, holding that contracts made on the first day of the week, commonly called Sunday, are incapable of enforcement. The rule pronounced in these cases has long been the law of this State. There are very many cases enforcing this rule. Reynolds v. State, 4 Ind. 619; Barker v. Werts, 13 Ind. 203; Love v. Wells, 25 Ind. 503; Davis v. Barges, 57 Ind. 54; Gilbert v. Vachen, 69 Ind. 374; Parker v. Pitts, 73 Ind. 597; Miller v. State, this term.

Some of them have carried the doctrine very far, possibly too far. In Clemens v. Sink, 7 Blkf. 480, it was held that a replevin bond executed on Sunday was invalid, and in Catlett v. Trustees, etc., 62 Ind. 365, the court decided that a subscription to a church made on Sunday was void. No rule is more firmly settled than the one under mention, and we can not now depart from it.

A penalty can not be recovered for the failure to perform an illegal contract. The statute does not apply to contracts which are without legal force.

The evident intention of the legislature was to secure the performance of such contracts as imposed binding obligations upon the telegraph companies. The statute is a highly penal one, and we can not extend its operation by a liberal construction. Western Union Telegraph Co. v. Axtell, 60 Ind. 199. We certainly can not bring within its provisions a case, such as the present, where there is, in legal effect, no contract at all.

Courts can not declare, as a matter of law, that the business of telegraphy is a work of necessity. There are, doubtless, many cases in which the sending and delivering of a message would be a work of necessity, within the meaning of our statute. But we can not judicially declare that all contracts for the transmission of telegraphic messages are to be deemed within the statutory exception. Whether the contract is within the exception must be determined, as a question of fact, from the evidence in each particular case.

We can not adjudge that the message which the appellee agreed to transmit is one which comes within the statute permitting the performance of works of necessity. It reads thus: "Come up in morning, bring all." These words are to be taken in their ordinary meaning, for there is nothing ascribing to them any other or different signification. Upon their face they imply a friendly invitation to visit the sender. Such a message can not be regarded as a "work of necessity," within the meaning of the statute.

The contract for the transmission of the message having been made on Sunday, and the message not being one which can be treated as entitling it to be transmitted as "a work of necessity," the contract for its transmission must be adjudged incapable of enforcement. As the appellee violated no valid contract, there is no foundation for the claim to the penalty prescribed by statute.

So far our consideration has been confined to the questions presented upon the first paragraph of the complaint and the answer thereto; we turn now to the questions presented upon the second paragraph of the complaint.

This paragraph alleges the undertaking to transmit the message to have been entered into on the 5th day of October, 1879; that the message was

telegraphed to Vincennes on that day; that the person to whom it was addressed, inquired at the proper office for the message on the 6th day of that month, but that it was not delivered to him until the following day. The appellant maintains that the defense that the contract for the transmission of the message was made on Sunday is not a sufficient answer to this paragraph. We can not assent to this view. The right to recover the statutory penalty depends upon the validity of the contract under which the message was received. Unless there is such a contract as imposed a binding obligation upon the telegraph company, there is no right to inflict punishment, for no legal duty has been violated. A violation of a legal duty is essential to a right of action for the recovery of the penalty. The retention of the message and of the consideration paid for its sending, did not create a new contract. The only contract was that made on Sunday. What was afterwards done, did not constitute a new and different agreement.

The action, it must be borne in mind, is not one for the recovery of damages for a breach of contract. Nor is it a case for the redress of injuries arising from a tort. It is a civil action for the recovery of a penalty prescribed by statute, not for the purpose of making good any loss that the senders of a message may have sustained, but for the purpose of punishing telegraph companies for the negligent failure to transmit messages which they, by valid contracts, undertake to transmit. We can, therefore, derive no assistance from the cases which hold that for a tort committed on Sunday by common carriers, or for the matter of that, by any body else, an action will lie.

It is settled that the retention of what has been received under a contract entered into on Sunday will not of itself be a ratification. Perkins v. Jones, 26 Ind. 499. If the retention of the consideration can not be regarded as constituting a ratification in cases where the relief sought is an enforcement of the right given by the contract, it certainly can not be so regarded where the object of the action is the recovery of a statutory penalty. It may well be doubted whether anything short of an independent contract can, in such a case, create such a new duty as will supply sufficient foundation for an action to recover the penalty which the statute has affixed, by way of punishment, for a breach of duty.

Judgment affirmed.

LAY OPINIONS ON LEGAL SUBJECTS.

THE IRISH LAND ACT.

In its details the bill is undoubtedly complicated and difficult to understand. Looked at, however, in a comprehensive way, its complications vanish, and its salient characteristics stand out in prominent relief, just as the small inequalities in a landscape, which seem so prodigious to the traveller in the valley, grow less, and finally disappear altogether when viewed from the height of an adjacent hill. Taking this kind of bird's-eye view of Mr. Gladstone's second experience in pacifying Ireland, we find that what the bill accomplishes may be summarized in the following manner, which, it is hoped, will help persons who have consistently refused to follow all the endless bendings and windings of clauses, sections, subsections, amendments, amended amendments, and amended amendments reamended, to comprehend with tolerable accuracy what this land act is which Parliament has just added to the statute book.

On the novel, unheard-of, completely un-English, yet needful provision, which enables a court to pronounce what is a fair rent for a particular holding, the whole merit of the bill, as Mr. Gladstone himself acknowledged, virtually depends. It is the hinge on which everything turns. Two at least of the farmers' "Three F's" the bill grants — namely, "Fair Rent" and "Fixity of Tenure." Not absolute "fixity" in the sense that the landlord can not, for gross injury done to the land, get rid of his tenant; but the complete feeling of certainty on the part of the tenant that, during good behavior, he will be allowed to plough and sow, and gather into barns, without fear of capricious eviction. The last of the "Three F's" is "Free Sale." This is a peculiarly Irish institution. Some persons, the Marquis of Salisbury among them, contend that this means giving the tenant the right to sell that which he never purchased. Others, including the members of the government, urge that, if the tenant has not purchased his right in his tenancy with money, he has paid for it with the sweat of his brow, and has an indefeasible interest in it.

Looked at a little more closely still, and taking the "Three F's" in their order, this is what the land act will precisely effect.

1. Free Sale.—What the tenant has to sell is the "good-will" of his farm. This is something over and above the fair market value of his holding. It is the value of the tenant's improvements, *plus* the sentimental interest that he has acquired by living on the land for a number of years, *plus* the increased value which land in Ireland possesses compared with land elsewhere—owing to the fact of the extreme competition for a bit of soil existing among all true followers of St. Patrick. In Ulster the tenant has always had the customary right to sell this good-will, and the act of 1870 gave legislative sanction to the custom. The act

of 1881 goes further, and extends the Ulster custom all over Ireland. An Irish tenant may now sell his good-will to anybody, with this proviso, that the landlord has a right to object to the newcomer if all the improvements on the estate have been made and "substantially maintained," not by the tenant, but by the landlord himself. The obvious result of the legislation of free sale is, that the outgoing tenant receives a large sum of money, while the incomer is depleted to exactly the same amount, which cripples his resources and leaves him proportionately less able to meet his rent and to expend capital on developing the land.

2. Fair Rent.—As we have pointed out, the defect of the last act was that landlords could run up their rent to any extent, and thus force tenants to leave. They did not "evict;" they merely compelled tenants to "resign." The act of 1881 allows any Irish tenant to go to "the court," meaning the civil bill court of the particular county in which he lives, and ask it to fix what is the fair rent for him to pay. The landlord can also go to the court with the same request. But how are the court to fix that shadowy and uncertain thing, a really "fair" rental for a tenant to pay? Luckily, the court are not left entirely without guidance as to the principles upon which they are to proceed. They are, in fixing the rent, to take into account, "the interests of the landlord and of the tenant respectively." Then they are also not necessarily to lower the rent because the tenant has had to pay a large sum for good-will or tenant-right when entering into the tenancy. The court may, under certain circumstances, if it likes, do so; but the Act expressly states that "the amount paid for the tenant-right is not to be alone of itself a reason for reducing the rent." Then it practically comes to this, that the court has simply to go on general principles of justice and equity in deciding what rent is a "fair rent." When it has fixed that rent, a "statutory term" of fifteen years commences, during which it is impossible for the landlord to raise the rent, or to evict his tenant, except for what is called a breach of the "statutory conditions"—that is to say, during this fifteen years of safety to the occupying tenant the only acts by which the tenant can imperil that safety are subletting without the landlord's leave, failing to pay his rent, committing "waste," and other analogous misdeeds.

3. Fixity of Tenure.—This is the natural and necessary corollary of fair rents. For what possible good can there be in allowing a tenant to pay a moderate rent, if he is liable to be turned out at a moment's notice? This boon of fixity—or, as Mr. Gladstone prefers to call it, security—of tenure, is given by the fifteen years' term noticed above. During that fifteen years the tenant is to be one—and by far the most irremovable—of his landlord's "fixtures." Thus endowed with the three substantial benefits of liberty to sell his tenancy for what he can get, security against excessive rents, and security against eviction, the Hibernian farmer is right in supposing that there is "a good time coming." But the question naturally arises, what is to happen to those tenants who never trouble the courts about their rents? Are they to be left out in the cold, with no protection, or only the confessedly inadequate protection afforded by the Act of 1870? We take it that in a majority of Irish tenancies, tenants will appeal to the courts. Those who do not will be protected in this way: that, if turned out, they can claim compensation for disturbance, levied at a far higher rate than before, from their landlord, as well as compensation for improvement, and they will have a right to these two compensations, even though they are evicted for not paying rent.

There are one or two supplementary provisions of the Act which require a word of exposition. Emigration is to be facilitated by State grants in aid. The reclamation of waste lands is to be encouraged by the same method. Lastly, there is the extremely important provision for creating, in a small way, a body of peasant proprietors already attempted by the Bright Clauses of the old Land Act. The present Act authorizes advances to tenants for the purpose of purchasing their holdings. If bought out and out at once, as much as three-fourths of the purchase-money can be advanced by the Land Commission; if the land is burdened with a "fee farm rent"—in other words, with a yearly payment to the landlord—then half the purchase-money is all that can be supplied out of the public purse. These being the grand, cardinal and salient points of the measure which has occupied Parliament for the major part of the session, it now only remains for Irish landlords and Irish tenants to work together in a spirit of conciliation, so as to reap the greatest amount of benefit, both for themselves and the country, which the bill is capable of producing.—*Daily Telegraph* (London).

WEEKLY DIGEST OF RECENT CASES.

APPEAL—PREPARATION OF BILL OF EXCEPTIONS.

The bill of exceptions says: "The writ of restitution was then read in evidence, and is in these words and figures, to-wit." In making up the record the clerk did not copy the writ into the bill of exceptions, but subsequently, upon a writ of *certiorari*, he certified the writ read in evidence. *Held*, that the writ did not thus become part of the record. The bill of exceptions did not contain the direction to the clerk required by the statute, and he had, therefore, no authority to insert it in the writ. Unless the court authorizes him to copy into the record papers put in evidence, by the words "here insert," he has no authority to do so. *Endsley v. State*, S. C. Ind., February 18, 1882.

ASSIGNMENT—CONTRACT—LOAN—COLLATERALS—COLLECTION BY ASSIGNEE.

Defendant borrowed $500 from A, and gave him five $100 coupon bonds as collateral security. A failed, made an assignment, and became a fugitive. *Held*, on a suit by A's assignee, that he must produce the collaterals or account for them before he could recover from defendant. *Stuart v. Bigler*, S. C. Pa., October, 1881.

ATTORNEY AND CLIENT—PURCHASE OF SUBJECT OF LITIGATION.

While it is the duty of the attorney to protect the interest of his client, and the client is entitled, while the relation of attorney and client exists, to the full benefit of the best exertions of his attorney, and such attorney can not bring his own personal interest in any way into conflict with that which his duty requires him to do, or make a gain for himself in any manner whatever in respect to the subject of any transaction connected with, or arising out of, the relation of attorney and client, beyond the professional remuneration to which he is entitled, yet the law does not prohibit an attorney from purchasing from his client. If, however, he purchase a client's property, which is the subject-matter of the relation of attorneyship, during the existence of such relation, the burden of proof lies upon him to show the transaction has been perfectly fair, and that a just and adequate price has been given to his client therefor. *Yeamans v. James*, S. C. Kan., February 17, 1882.

BAILMENT—RIGHT OF TRUE OWNER TO DEMAND POSSESSION OF PERSONAL PROPERTY.

A package of money belonging to W alone, was sent by express directed to W & C, and, upon W demanding it as sole owner, without any assignment by C of his apparent interest to W, or written order by C to deliver to W, or offer of any receipt or acquittance from both, the express company refused to deliver it to W, claiming that the money had been subjected to process of garnishment in its hands: *Held*, that, apart from the question of garnishment, W may recover the full amount of the money. *Wells v. American Express Co.*, S. C. Wis., February 7, 1882.

BANK—DEPOSIT OF FUNDS HELD IN A FIDUCIARY CAPACITY.

The deposit in a bank of funds held in a fiduciary capacity in the agent's name as trustee, as "A. B., Trustee," is notice to the bank of the trust and the fiduciary character of the deposit. *Bundy v. Town of Monticello*, S. C. Ind., February 18, 1882.

COMMON CARRIER — PASSENGER — STOP-OVER CHECK.

1. A regulation by a railway company, by which one who has paid his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor, and present it to the conductor of the train on which he seeks to complete his journey, as evidence of his right to do so without further payment, is a reasonable regulation. 2. If the passenger, in such a case, asks the proper conductor for a stop-over ticket, and through the conductor's fault, receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train at some usual stopping place, using no unnecessary force; and such ejection will be no ground of recovery against the company, though such company will be liable to the passenger for the fault of the first conductor. *Yorton v. Milwaukee, etc. R. Co.*, S. C. Wis., February 7, 1882.

CONTRACT—CONSTRUCTION.

Where the defendant contracted to set up an engine and other machinery in the plaintiff's barge, "the whole work to be completed, set up in barge, and ready for trial trip (if vessel shall be ready for same), by the first day of April, 1880:" *Held*, that if plaintiff failed to have its barge ready in season to enable S, with reasonable diligence, to have the machinery set up therein by the 1st of April, the latter was still bound to have it set up within a reasonable time after the barge should in fact be finished; and would be liable to plaintiff for damages caused by his failure to do so. *Inter-Ocean Transp. Co. v. Sheriffs*, S. C. Wis., February 7, 1882.

CONVEYANCES—MORTGAGE—CONDITIONAL SALE.

Where a mortgagee forecloses his mortgage and obtains a sheriff's deed for the property, and afterward the mortgagor conveys the property to the mortgagee by a deed of general warranty, and the mortgagee at the same time leases the property to the mortgagor for three months, and stipulates that the mortgagor may have the privilege of purchasing the same, upon certain conditions, making time of the essence of the contract: *Held*, that the deed of conveyance and agreement, taken together, do not constitute a mortgage; but that the stipulation of the mortgagee, giving the mortgagor the privilege of repurchasing, is merely a conditional sale. *Eckert v. McBee*, S. C. Kan., February 17, 1882.

DAMAGES — PERSONAL INJURIES — ELEMENTS OF DAMAGES.

In an action for personal injuries to the plaintiff, which disqualified him to give his personal attention to the business which he had previously carried on, where such business consisted in the manufacture and sale of patented and other machines, it was error to admit proof of the average profits of his business while he carried it on as a basis for estimating his damages, such a basis being of too uncertain and speculative a character. *Bierbach v. Goodyear Rubber Co.*, S. C. Wis., February 7, 1882.

EVIDENCE—OFFER OF COMPROMISE—ADMISSION—TENDER.

Where an offer is made to pay money by way of compromise, and with the understanding between the parties that, if the money is accepted, it shall be a complete and final settlement between the parties: *Held*, that such offer to pay the money is not a tender in law, and that it does not necessarily or conclusively admit that anything is due from the person offering to pay the money to the other person; that a tender must be without condition, absolute, and it admits a liability for the amount tendered, while an offer to compromise may not admit anything, except that there is a dispute between the parties. *Latham v. Hartford*, S. C. Kan., February 17, 1882.

FRAUDULENT CONVEYANCE—EXCHANGE OF DEEDS—BONA FIDES OF ONE GRANTEE.

Where lands are exchanged, and one of the deeds is adjudged void as to the grantor's creditors, this does not affect the validity of the other deed. The defendant wife having conveyed her own land in Iowa (which was the homestead) to the defendant husband, by a valid deed, and taken from him in exchange a deed of Wisconsin land of less value, and there being no evidence that she knew of her husband's insolvency or indebtedness, a judgment

avoiding the deed to her, in favor of his creditors, is reversed for want of sufficient proof of fraud on her part. *Mehlhop v. Pettibone*, S. C. Wis., February 7, 1882.

HUSBAND AND WIFE — PURCHASE OF LAND WITH WIFE'S FUNDS—TITLE BY MISTAKE IN HUSBAND'S NAME.

Where a wife loans money to her husband with which to purchase a piece of land in O, and the land is purchased in the name of, and conveyed to, both of them; and afterward, the husband, desiring to trade the same for land in K, agrees that in payment of the money loaned to him by his wife, the deed for the land in K shall be executed to the wife, and the wife signs the deed conveying the land in O upon the express condition and agreement only that the deed for the land in K shall be executed to her; and the husband, in making the trade of the land in O for the land in K, acts entirely as the agent of his wife, but through a mistake of some person, not of the husband or wife, but, probably, of the person who drew up the deed, the deed for the land in K is executed to the husband: *Held*, that the husband takes the legal title to the land in K in trust for his wife, and that his wife holds the entire equitable title; and that the land is not subject to be attached for the husband's debts. *English v. Law*, S. C. Kan., February 19, 1882.

HUSBAND AND WIFE—NO OBLIGATION UPON WIDOW TO PAY HUSBAND'S MORTGAGE.

A widow is under no obligation to discharge a mortgage executed by her deceased husband, and the fact that she has paid money to the mortgagee does not create any presumption that it was paid in discharge of the mortgage. 73 Ind. 34. And this is so, although the mortgage has been foreclosed and the widow was made a party to the foreclosure suit. Such judgment does not estop her from asserting her right to recover the money so paid to the mortgagee. *Lemans v. Wiley*, S. C. Ind., Feb. 21, 1882.

JUDGMENT — CONCLUSIVENESS — COLLATERAL PROCEEDINGS.

The regularity of a judgment of a court having jurisdiction of the subject-matter, can not be questioned in a collateral proceeding. *McDonald v. Simcox*, S. C. Pa., November 21, 1881.

JUDGMENT—LIEN OF—VALIDITY—NOTICE.

A court of equity will not decree a judgment lien to be invalid on the ground of the want of legal notice to the defendant, where the plaintiff has not been guilty of misconduct and the defendant had actual knowledge of the pendency of the action, unless a meritorious defense to the action be shown. *Gifford v. Morrison*, S. C. Ohio, January, 1882.

JURISDICTION — TRUST CREATED IN ANOTHER STATE.

The trust on which the property sought to be reached by this bill is held, having been created by the will of a citizen of Connecticut, and it not appearing that there has been any probate or record of the will, or appointment of the trustee, in this commonwealth, the trust can be enforced by the beneficiary, or availed of by his creditors, in the courts of Connecticut only. *Leland v. Smith*, S. J. C. Mass., January, 1882.

LIEN — OF JUDGMENT — PRIORITIES — AGREEMENT BETWEEN LIENHOLDERS—INNOCENT PURCHASER.

Where a bank holds a judgment which is a first lien upon real estate, and an arrangement is made between the officers of the bank and the parties to a mortgage subsequently executed upon the same premises, that the mortgage is to be considered a prior lien to the judgment of the bank, but the records continue to show the judgment to be prior and paramount, and the premises are sold under the judgment, and an innocent purchaser for value, without notice, acquired title thereto: *Held*, that such purchaser is not subject to the equities existing between the mortgagee and bank; nor subject to any equities in favor of the parties having title under foreclosure of the mortgage. *Baker v. Woolson*, S. C. Kan., February 19, 1882.

LIMITATIONS—ACTIONS FOR LEGACY.

The rule that the statute of limitations does not apply to an action against executors for a legacy, does not apply to a suit against a devisee to recover a legacy which the testator directs him to pay. *Etter v. Greenawalt*, S. C. Pa., October, 1881.

LIMITATIONS—PAYMENT BY PRINCIPAL DEBTOR—EFFECT UPON SURETY'S LIABILITY.

A payment by a principal debtor, which will take a case out of the statute of limitations as to him, will have the same effect as to his surety, who is present for the purpose of seeing that the payment is made and credited, and makes no statement that any limitation shall be placed on the effect of such act. *Glick v. Crist*, S. C. Ohio, Dec. 13, 1881.

NEGLIGENCE—INJURY OF TRAIN EMPLOYEE FROM COLLISION WITH CATTLE—LIABILITY OF CATTLE-OWNER.

Plaintiff's intestate was a fireman employed on the L. L. & G. R. R., and while engaged in running a freight train struck a steer belonging to defendant, which had strayed on the track; the engine and tender were thrown from the track, and plaintiff's intestate so injured that he died. The right-of-way at the place of the injury was owned in fee simple by the railroad company, who had obtained a deed therefor from the defendant, the latter owning the land on both sides of the right-of-way. The railroad was unfenced. Defendant was in the habit of turning his cattle loose on his own lands, and they frequently strayed on and across the railroad track; *held*, that plaintiff had no cause of action against the defendant. *Sherman v. Anderson*. S. C. Kan., February 19. 1882.

NEGLIGENCE — MASTER AND SERVANT — FELLOW-SERVANT—PERILS OF SERVICE.

Plaintiff, while going as shoveler of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snowbank from the track by means of the snow-plow alone, aided by the momentum of the train. *Held*, upon all the facts set out in the complaint, that a recovery by plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business, which he assumed, and that the conductor and others whose negligence is alleged, were fellow-servants in the same employment. *Howland v. Milwaukee, etc. R. Co.*, S. C. Wis., February 7, 1882.

NEGLIGENCE—MASTER AND SERVANT—SAFETY OF APPLIANCES—RAILROAD COMPANY.

1. In an action against a railway company (under sec. 1816 R. S.), for injuries to an employee, where the whole evidence shows beyond dispute that the sole cause of the injuries was the use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat

decayed condition of the wood at the place of such bolt, and that there was no external indication of these defects, and the person injured had been frequently in charge of the same car and in the habit of using the same ladder, there was no error in directing a non-suit. 2. One railroad company receiving a loaded car from another, and runniag it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition, are so in fact. *Ballou v. Chicago, etc. R. Co.*, S. C. Wis., February 7, 1882.

NOTICE—TO A CORPORATION TO BIND THE PLEDGEE OF STOCK.

Where a person is merely in possession of the stock of a national bank as collateral security for the payment of a debt, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the bank corporation as to be bound by the knowledge of the facts in possession of the officers of such bank. *Baker v. Woolson*, S. C. Kan., February 19, 1882.

SHERIFF'S SALE—CONTRADICTING RETURN.

Appellants' complaint alleges that Shaw obtained a judgment against them, and an execution issued on said judgment, under which their land was sold and bid in by Shaw. Prayer that the judgment be declared satisfied. Appellants introduced in evidence the judgment, execution and return of the sheriff, the latter showing that no sale had been made. They then offered to prove by parol that a sale was in fact made, but their offer was refused. This was right. The return of a sheriff can not be contradicted in such a case. *Clark v. Shaw*, S. C. Ind., February 21, 1882.

WILL—DEVISE, WITH DIRECTIONS TO PAY LEGACY.

A devisee who accepts a devise, which is coupled with a direction by the testator that the devisee shall pay a sum of money to another, renders himself personally liable to pay such sum. This is so, whether the legacy is or is not made a charge on the land devised. *Etter v. Greenawalt*, S. C. Pa., October, 1881.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

11. A had on deposit in the bank of C, the sum of $5,000, and was indebted to the bank on note in the sum of $3,000, when the bank failed and passed into the hands of a receiver. Must A pay the note and take his chances with the other creditors, or is he entitled to offset his deposit against the note? M.

St. Louis, Mo.

12. A promissory note is executed and delivered in the following language: Feb. 22, 1881. $375. One day after date I promise to pay A B, or order, the sum of three hundred and seventy-five dollars, with ten per cent. interest (10 per cent.) from date until paid, for value received. Signed, C D;" to which the following is added: "I hereby agree that this note may be paid in installments, provided all of it be paid within two years. Signed, A B." *Quære*: When does this note fall due? Should it be held that this *addenda* has the effect to change the time as to the maturity? Will that fact be affected by the non-payment of any installments? Was there any other consideration for the agreement, than that the installments should be paid, when, in fact, the agreement was merely for the accommodation of the maker?

Denver, Col. J. M. E.

13. A obtained judgment against B in the circuit court in 1874, and being unable to find property, no execution was issued, nor was the judgment revived. In 1876 B died intestate, and no administration has been had upon the estate. In 1880, B's heirs bring suit in partition against B's brother for an interest in lands which B acquired by descent before rendition of the judgment, and get judgment for forty acres. Can A maintain suit on his judgment against these heirs of B and have the land sold, or must the estate of B be administered upon? M.

14. A obtained a judgment against B before a justice of the peace. The return shows that personal service was had, but the fact is that B was not within the State, and not served; C was garnished under execution issued on this judgment, and answered that he owed B, but that the debt was not due. Cause continued until debt matures, and is now pending. The judgment being void as to B, what is his remedy? This in Missouri. A. H. K.

Kansas City, Mo.

15. The statute of Maine provides that "whoever travels on or does any work, labor or business on the Lord's day, except works of necessity or charity, shall be punished by fine not exceeding ten dollars." Query: Whether one having attended church on the Lord's day, and after church, going out of his way to mail a letter, is injured by snow or ice falling from a building owned by the city, situate upon a street can recover damages for injuries? K.

Portland, Me.

16. A and B make a contract. The agreement is signed by A in Indiana, is then forwarded to B, who lives in Ohio; B signs and returns to A. Where is the contract made? O. L. M.

Indianapolis, Ind.

QUERIES ANSWERED.

Query 62. [13 Cent. L. J. 498.] A negro man and woman, A and B, being slaves, were, by consent of their masters, and according to the custom then prevailing among that race, married, and lived together until separated by the will of their masters. From this marriage two children were born. After emancipation A married C and died intestate, leaving no children by C. Can the children by first marriage claim an interest in A's estate as against C, the law in Mississippi being that, on the death of a husband without legitimate children, his wife inherits all his estate? The question is simply, Are the children of A and B bastards?

Coffeeville, Miss. R. R.

Answer. Marriage may be proved by parol evidence. Campbell v. Gullatt, 43 Ala. 57; Dickerson v. Brown, 49 Miss. 357; Bissell v. Bissell, 55 Barb. 325; Illinois Land Co. v. Bonner, 75 Ills. 315. In all civil issues, reputation and cohabitation are sufficient evidence of marriage. 2 Greenl. on Ev., sec. 462; Spenser v. Bower, 1 Pa. 450. In cases affecting the legitimacy of

children, the courts favor the presumption of marriage. Strode v. Mogowan, 2 Bush, 621; Whitman v. State, 34 Ind. 360; Sullivan v. Kelly, 3 Allen, 148. Marriage is a civil contract which may be completed by any words, without regard to form. Hantz v. Sealy, 6 Binn. 405. The Supreme Court of the United States in Meister v. Moore, 96 U. S. 76, held that a consensual marriage at common law is valid, notwithstanding the statutes of the State where it was contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity. See, also, Bishop on Mar. & Div., sec. 283, and notes; Hutchins v. Kimmell, 31 Mich. 126. B. B. BOONE.

Mobile, Ala.

Query 6. [14 Cent. L. J. 118.] A person makes a fraudulent transfer of all his property to place it beyond the reach of a large judgment that is about to be taken against him. The other creditors, as a reasonable satisfaction of their debts, accept a conveyance from the fraudulent grantee to them of all this property. Do they get a good title? In other words, may a fraudulent grantee prefer the grantor's creditors?

Indianapolis, Ind. A.

Answer. It is a principle of equity, that fraud vitiates or makes void all transactions into which it enters as a material ingredient. By the common law, all transfers made to defraud creditors are void. If the grantee had notice of the judgment against the creditor, and purchased in order to defeat the creditor's claim, the transfer is void. And as such transfer would be void on the ground of absolute fraud, it would be void *ab initio*, and the subsequent conveyance by the grantee is invalid, and he is liable to the judgment creditor for his debt. The judgment creditor can file a bill in equity to have the first transfer set aside. If the grantor was in insolvent circumstances, he might lawfully prefer one set of creditors to another; and if the grantee was his trustee, acting under his orders for the purpose of paying off a particular set of creditors, the entire transaction would be upheld in a court of equity. Also, if the creditors accepted the conveyance from the grantee without notice that the previous transfer was fraudulent, and therefore void, their title will be good; yet, if the circumstances were such that they might have inferred that the purpose was to defraud the judgment creditor, their title will be invalid, and the sale or conveyance can be set aside by the judgment creditor by a bill filed in the chancery court. W. C. F.

Fayetteville, Tenn.

RECENT LEGAL LITERATURE.

JACOB'S FISHER'S DIGEST. An Analytical Digest of the Law and Practice of the Courts of Common Law, Divorce, Probate, Admiralty and Bankruptcy, and of the High Court of Justice and Court of Appeal of England, Comprising the Reported Cases from 1756 to 1878, with References to the Rules and Statutes founded on the Digests of Harrison and Fisher. By Ephraim A. Jacob, of the New York Bar. Vol. 8, containing the titles, Replication—Warranty and Deceit. New York, 1881: George S. Diossy.

The eighth volume of this excellent work will be warmly welcomed by the profession, who are, in our opinion, to be congratulated upon the near approach of its completion. We have already expressed our opinion of the work as a whole. This volume is in every way equal to its predecessors.

BRADWELL'S REPORTS. Reports of Decisions of the Appellate Courts of the State of Illinois. By James B. Bradwell. Vol. 9. Chicago, 1882: Chicago Legal News Co.

This volume, issued with the usual promptness which has characterized the preceding individuals of the series, is in every other respect up to the standard of its fellows. The mechanical execution is a credit to the complete establishment of the *Chicago Legal News*, where it was printed.

NOTES.

——Occasionally judges find themselves in conflict with members of the public who are under no professional privilege or restraint. Some maintain their dignity by fining and committing for contempt of court. This course may in some cases be necessary, but a delicate ridicule is generally much more effective. A troublesome attorney, who was pleading his own cause and raising untenable points before Lord Ellenborough, became exasperated because he was invariably overruled, and exclaimed: "My lord, my lord; although your lordship is so great a man now, I remember the time when I could have got your opinion for five shillings." Such impertinence would, with many judges, have led to the committal of the offender; but Lord Ellenborough merely observed, with an amused smile, "Sir, I dare say it was not worth the money." The same judge was on one occasion sitting at the Guildhall, when Henry Hunt, the famous demagogue, appeared upon the floor of the court. Mr. Justice Talfourd describes the scene which followed in these terms: "I am here, my lord, on the part of the boy Dogood, proceeded the undaunted Quixote. His lordship cast a moment's glance at the printed list, and quietly said, 'Mr. Hunt, I see no name of any boy Dogood in the paper of causes,' and turned toward the door of his room. 'My lord,' vociferated the orator, 'am I to have no redress for an unfortunate youth? I thought your lordship was sitting for the redress of injuries in a court of justice.' 'Oh! no, Mr. Hunt,' still calmly responded the judge; 'I am sitting at Nisi Prius; and I have no right to redress any injuries except those which may be brought before the jury and me in the causes appointed for trial.' 'My lord,' then said Mr. Hunt, somewhat subdued by the unexpected amenity of the judge, 'I only desire to protest.' 'Oh? is that all?' said Lord Ellenborough; 'by all means protest, and go about your business.' So Mr. Hunt protested and went about his business; and my lord went unruffled to his dinner, and both parties were content."—*Wit and Wisdom of the Bench and Bar.*